

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Digital Audio Broadcasting Systems)	MM Docket No. 99-325
And Their Impact on the Terrestrial)	
Radio Broadcast Service.)	
)	

To: The Commission

**REPLY COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION
AND THE SONGWRITERS GUILD OF AMERICA**

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REPLY COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION
AND THE SONGWRITERS GUILD OF AMERICA

The National Music Publishers' Association ("NMPA") and The Songwriters Guild of America (the "SGA") hereby submit these reply comments in connection with the Commission's Notice of Inquiry and Further Notice of Proposed Rulemaking ("FNPRM"), FCC 04-99 (Adopted: April 15, 2004; Released April 20, 2004) in the above-captioned proceeding.

I. Introduction

NMPA works to protect and advance the interests of the music publishing industry. With more than 800 members, NMPA represents the leading companies in the industry, from those affiliated with large media companies to the industry's largest and most influential independent music publishers. The Harry Fox Agency, NMPA's licensing affiliate, provides an information source, clearinghouse, and monitoring service for licensing music copyrights and acts as licensing agent for more than 27,000 music publisher-principals, who in turn represent more than 160,000 songwriters.

Organized in 1931, the SGA is the nation's oldest and largest organization run exclusively by and for songwriters, with over 5,000 members nationwide. The Guild is a voluntary association comprised of composers and the estates of deceased members. The SGA provides contract advice, royalty collection and audit services, copyright renewal and termination filings, and numerous other benefits to its members.

The instant proceeding is of interest to NMPA and the SGA primarily because of HD Radio's potential impact on the reproduction and distribution of digital copies of music,

including the use of the Internet to further redistribute copies of HD Radio broadcasts.¹ NMPA filed comments in this proceeding and now with the SGA files these reply comments in order to make the Commission aware of certain inaccuracies in comments that have been made by other parties.

II. Discussion

A. Broadcast of Sound Recordings Requires a License from Music Publishers.

Many of the parties filing comments in this proceeding have mistakenly asserted that the broadcast of sound recordings over terrestrial radio does not require any permission or license.² This is simply wrong. Each sound recording embodies a song (or “musical work”) which is subject to a separate copyright from the sound recording, unless that song is in the public domain. Although the sound recording copyright exempts broadcasters from requiring a license from the sound recording copyright owner, that exemption does not apply to the underlying song. In fact, each broadcaster must license the public performance right for the songs present in the sound recording, typically through a public performance licensing organization like ASCAP, BMI or SESAC. Many of the songwriters and publishing companies that NMPA represents enter into agreements with organizations like ASCAP and BMI to provide public performance licenses to radio stations. The development of HD Radio

¹ The exclusive rights of music copyright owners to reproduce and distribute their works are found at 17 U.S.C. 106(1) and 106(3). This right should be distinguished from the right of such owners to publicly perform these works, which is found at 17 U.S.C. 106(4) and which is typically administered by “performing rights organizations” such as ASCAP and BMI.

² The following is a collection of incorrect interpretations of the Copyright Act filed in this proceeding: “The Copyright Act exempts free terrestrial digital radio from licensing requirements that benefit content owners.”, Comments of iBiquity at p. 33; “The Copyright Act denies to phonorecord producers any licensing authority over the free terrestrial broadcast....”, Comments of the Consumer Electronics Association (“CEA”) at pp. 3, 5; “In fact, the RIAA companies are not legally entitled to withhold content from digital audio broadcasters...”, Comments of the Electronic Frontier Foundation at p.18; “But in the case of digital terrestrial broadcasts of sound recordings, there are no rights under license on any discretionary basis.” Comments of the Home Recording Rights Coalition at p. 5.

has not nullified this licensing requirement. Therefore, songwriters and music publishers are well within their rights to decide to change how and when their songs will be released for public performance. Discretion is held by songwriters (including recording artists who have written and recorded their songs), and their music publishers, to delay newly released material for radio broadcast in order to avoid piracy from HD Radio, as NMPA discussed in its comments of June 16th in this proceeding. This discretionary power is exclusively granted by the Copyright Act.³ The Commission should not be misled by these misstatements by technology companies, media industry groups or consumer-interest groups funded by the electronics industry.

B. Waiting for iBiquity to Decide When to Activate its Copy Protection is an Inappropriate Delegation of FCC Authority to a Single Private Party.

iBiquity has confirmed that its technology already contains the capability to apply encryption and copy protection to the HD Radio signal.⁴ Although this is encouraging, iBiquity further asserts that it will only employ the technology "to the extent there is an industry consensus on the existence of a problem and an acceptable solution."⁵ Given that many commenters opposed the protection of DTV broadcasts and have even asserted that the rampant piracy through peer-to-peer networks is acceptable behavior⁶, iBiquity is merely

³ " ...[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ...to perform the copyrighted work publicly" 17 U.S.C. §106(4).

⁴ Comments of iBiquity at p. 28 ("iBiquity repeatedly and publicly has stated that it is prepared to implement a copy control scheme designed to prevent unauthorized distribution of copyrighted works *to the extent there is an industry consensus on the existence of a problem and an acceptable solution.*").

⁵ *Id.*

⁶ From the EFF website: "There are over 60 million people in the United States who use file sharing - more than the number of people who voted for our current President. If we all band together and stand up for our rights, we can change the law." <http://www.eff.org/share/>. From the CEA website "....we must give the benefit of the doubt to every new technology... ." CEA President and CEO Gary Shapiro, at a Heritage Foundation panel on "Pirates and Posses: The Battle Over Digital Copyright", Washington, D.C., 2002. http://www.ce.org/press_room/press_release_detail.asp?id=10082

offering cold comfort for content owners in order to achieve its near-term goals. NMPA and the SGA do not think that iBiquity should decide when or whether to implement copy protection for the benefit of the content creators. Further, past assertions of the interested parties indicate that copy protection will not be put in place unless the NAB and others with controlling stakes in iBiquity decide to do so. Moreover, the assertion of "legacy device" arguments to prevent copy protection demonstrates that the content industry cannot accept a wait-and-see attitude: once the legacy devices are in the market, the "industry", so to speak, will then justify their objection to any copyright protection mechanism on the basis of protecting the legacy device owner. This is a classic case where an assertion of regulatory power is in order.

C. *The AHRA Does Not Prohibit the FCC from Acting in the Area of Copy Protection for Digital Radio where such Acts are Compatible with Copyright Law.*

Several commenters assert that the Audio Home Recording Act⁷ preempts any Commission action in the area of copy protection for digital audio broadcast ("DAB"). The assertion by EFF and others of this clever gambit is proffered without any legal support. The EFF does not cite any legal precedent for the notion that a federal agency is precluded from acting under the authority of one statute in an area related to a second statute that is administered by another federal agency, so long as that action is consistent with both statutes. NMPA and the SGA presume that if EFF could cite legal authority to support its implausible argument, it would have. Regardless of whether devices that record DAB must comply with the AHRA,⁸ nothing in the Copyright Act precludes the application of additional legal requirements on the device under the Communications Act if those additional legal requirements are not inconsistent with rights granted by the Copyright Act.

⁷ 17 U.S.C. §§ 1001 *et seq.* (2004).

⁸ 17 U.S.C. §1002 (2004).

Furthermore, the so-called "home recording" exemption of the AHRA does not include redistribution of the recordings so made.⁹ Distribution of recordings is a distinct copyright from the creation of the copy.¹⁰ Thus, the home user who might use an AHRA-compliant device to record DAB would still be liable for unauthorized distribution of the digital recording thereafter. The AHRA only provides rules for compliant devices, for royalties to be paid, and that manufacturers are exempt from certain contributory infringement liability for the sale of the compliant device.¹¹ This exemption clearly is not applicable to the extent that the recording device is further re-distributing the recordings.

D. Peer-to-Peer Piracy Does Not Justify Inaction for HD Radio.

It is both cynical and illogical to argue against copy protection for HD Radio because peer-to-peer file sharing systems presently provide a source of illicit copyrighted works.¹² This logic would justify allowing physicians to engage in drug dealing because there are already sources of illicit drugs on the streets. Moreover, from a practical standpoint, it is expected that, over time, the sources of illicit files will be restricted as the industry moves from CDs, which do not have any copy protection, to on-line distribution of content or other protected formats like DVD-Audio. Given current trends, digital radio emerges as perhaps the principal source of free, CD-quality content that can be reproduced and distributed without permission of the copyright owner, unless copy protection of the DAB broadcast is instituted.

⁹ The exemption is for "making ... recordings", which is copying, a distinct right from distributing or publicly performing the copy. 17 U.S.C. §1008 (2004); 17 U.S.C. §106(3), (4).

¹⁰ 17 U.S.C. §106(1) vs. §106(3), (2004).

¹¹ 17 U.S.C. §1008 (2004).

¹² Comments of iBiquity at p. 30.

E. *Comparisons of Bit-Rates are Misleading because Lower Bit Rates Can Support Higher Fidelity.*

The comments of Public Knowledge, Consumers Union, and Consumer Federation of America imply that because HD Radio has a lower bit rate than other media, such as CDs and MP3, the quality of HD Radio must be lower and piracy of HD Radio will therefore not be a problem.¹³ Such a comparison of bit rates, however, is simply not an accurate way to determine quality. iBiquity has adopted technology that uses the peculiarities of auditory perception to wring ever higher sound quality out of lower bit rates. For example, Spectral Band Replication ("SBR")¹⁴ and other enhancements to audio coding make comparisons of bit-rates misleading: iBiquity has adopted SBR technology, so that its 98KBPS bandwidth audio is comparable to CD quality.¹⁵ Therefore, assertions that the low bit-rates of DAB using iBiquity means a signal inferior to FM quality are simply wrong, and further inferences regarding piracy are unsupported.¹⁶

¹³ Comments of Public Knowledge, Consumers Union, and Consumer Federation of America at page 8.

¹⁴ <http://www.codingtechnologies.com/>;

¹⁵ <http://www.ibiquity.com/press/pr/081203.htm>

¹⁶ This point is further contradicted by the fact that iBiquity has consistently asserted its "CD-quality" level in order to convince the Commission to mandate the technology. *E.g.*, Comments of iBiquity at p. 4 ("FM broadcasters will be able to provide CD-quality audio and AM broadcasters will be able to provide FM-like service."). PK/CU/CFA implicitly recognize that a straight comparison of bit rates is a flawed measurement of quality when they say that the format of the stream also affects quality, yet they nevertheless proceed to draw conclusions about quality based on such simplistic comparisons. Comments of Public Knowledge, Consumers Union, and Consumer Federation of America at page 8.

III. Conclusion

NMPA and the SGA request that the Commission adopt rules to protect the copyright interests of songwriters and artists whose works would be broadcast over DAB.

Respectfully submitted,

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